No. 10,068

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE M. STOUT, State Liquor Administrator of the State of California, and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

Appellants,

vs.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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INTRODUCTION.

We are in receipt of brief for appellee, and respectfully submit this reply. We detect no disagreement as to the facts of the case as stated in our opening brief. However, in his statements as to jurisdiction and of the case, contained on pages 1 through 4 of appellee's brief, there are certain argumentative matters to which we do not accede. Such of these argumentative statements as have any bearing on the case will be discussed in considering appellee's argument.

Appellee sets forth on page 5 of his brief a statement of the questions presented on appeal. We submit that his questions numbered (1) and (3) are presented, but that the remainder of appellee's statement has no bearing upon the instant proceeding.

APPELLEE'S ARGUMENT CONSIDERED.

1. THE CONTENTION THAT ONLY OPERATION, RATHER THAN MERE POSSESSION, REQUIRED A LICENSE.

Appellee devotes pages 6 through 10 to his contention that a trustee in bankruptcy is not required to comply with state law unless he operates a business. It is stated that a trustee in bankruptcy is not included within the definition of "person" as defined for the purposes of the California Alcoholic Beverage Control Act (Statutes 1935, page 1123, as amended by Statutes 1937, pages 1934 and 2126; Deering's General Laws, Act 3796) because "a trustee in bankruptcy is not specifically mentioned in the definition * * *"

The definition includes "estate", "trust" and "receiver", and we submit that the Act applies to a trustee in bankruptcy, or an estate in bankruptcy, or a receiver appointed by a bankruptcy court to the same extent as it would apply to the assets of a decedent, a trustee under a testamentary trust, or a receiver appointed in a court of equity of either the state or the United States.

It is contended on page 7 that a trustee in bankruptcy, being an officer of the bankruptcy court, is "identical with the sovereign power of the United

States * * *'' The authority cited is the case of *Associated etc. Co. v. Riley,* 39 Cal. App. (2d) 235.

That case dealt with a state alcoholic beverage tax act, but has nothing else in common with the instant proceeding. In that case the United States seized and sold liquor for unpaid customs duties, and it was contended that the United States was first in possession and should have paid the tax imposed by sections 1 and 5 of the California Beverage Tax Act of 1933 (Statutes 1933, page 625), being the person "first in possession" of a beverage "within the state after completion of the act of importation."

It was held by the court that the United States, in seizing and selling the liquor for unpaid customs duties, was engaged in a purely governmental function and therefore not subject to the taxing statute.

No other authority is cited for the proposition that a trustee in bankruptcy taking possession or holding title to property of a bankruptcy estate is acting for the United States.

The case of *In re Pea Products Inc.,* 37 Fed. Supp. 658, is quoted. Analysis of this decision discloses that the issue there was whether a trustee in bankruptcy was required to procure a permit to sell tangible personal property pursuant to the California Retail Sales Tax Act before making a single sale of the physical assets of the bankrupt. The statute in that case applied only to "retailers" and a retailer was therein defined as "* * * every person engaged in the business of making sales at retail or in the business of making

retail sales at auction of tangible personal property owned by such person or others * * *" (Secs. 3 and 2(e), Sales Tax Act, Statutes 1933, page 2599.) The taxable act or functional element of that statute was *engaging in business.* Obviously, the trustee, in proposing a single sale of the entire estate, could not have been *engaging in the business of making sales at retail.*

The author of the opinion in that case has, however, applied the California Alcoholic Beverage Control Act to a single sale of warehouse receipts to alcoholic beverages located in this state and held that the owner of such warehouse receipts must *possess a license* in order to make a *single sale* of his property.

> *Rude v. Collins, et al.,* No. 615-M, Civil, U. S. District Court, Southern District of California, Central Division. Opinion transcribed but not reported, September 16, 1940.

In the case of *In re Conkey,* No. 38,829C in the same court and division, a motion to dismiss a petition for injunction restraining state enforcement officers from prosecuting or threatening to prosecute a trustee in bankruptcy for a proposed *single sale* of alcoholic beverages received from the bankrupt was granted without opinion.

In the case of *People v. United States etc. Co.,* 45 Cal. App. (2d) 474, the state court held a liquidating receiver appointed by a bankruptcy court, in making a sale of alcoholic beverages, was subject to the California Beverage Tax Act, although he did not engage in the business of making such sales, and the court

there concluded that the case of *In re Pea Products Inc.,* supra, had no bearing upon the application of statutes of the State of California relating to alcoholic beverages.

We have no quarrel with the holding of the cases cited in this portion of the brief, but respectfully submit that they have no bearing upon the case and do not support appellee's conclusion on this point, reading (page 10):

> "* * * a trustee in bankruptcy is not subject to the payment of this tax during administration of the estate."

The trustee is required to pay the license fee—a tax in the broad sense—if he desires to possess the distillery equipment involved in this proceeding.

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2. THE CONTENTION THAT THE LICENSE FEE IS NOT YET DUE OR PAYABLE.

The burden of appellee's contention in this portion of his brief is that the license fee in question

> "* * * did not become payable until such time as the trustee rendered his account of his administration and was authorized to pay this tax by the referee * * *" (page 10).

It is then said that the State should file a claim or procure an order authorizing the trustee to pay the fee in advance of that time. The authority cited is Section 64 of the Bankruptcy Act as amended to June 22, 1938, setting forth the order of payment and

priority of claims filed in a bankruptcy proceeding and costs and expenses incurred, preserving the estate subsequent to the filing of a petition in bankruptcy.

We frankly confess our inability to appreciate the pertinence of the provisions of the Bankruptcy Act relating to priority of payment of claims and expenses. The simple fact of the matter is that unless and until the trustee applies for a license to possess the instant distilling equipment the license fee was not due by the terms of the Act. The license fee is paid for the privilege of possessing the still. If the trustee does not desire a license and does not pay the license fee, he does not acquire the privilege of possessing the distillery equipment and becomes liable to prosecution under the Act and the distillery equipment is forfeited to the State.

We agree with appellee that the fee in this case did not become due, but appellant denies that any question of priorities is presented. Rather, the fee was not due because there was no application for the license to which the payment of the fee was a condition precedent.

Alcoholic Beverage Control Act, Sec. 5(4).

Section 10 of the Act provides, in addition, "to obtain a license under this act application therefor, verified under oath, accompanied by the licensee fee therefor, must be made to the Board upon a form prescribed by the Board. * * *"

Such a license fee is not under the California law collectible where no application for license is made,

even though the licensed activity is conducted in direct violation of the licensing act. See:

People v. Craycroft, 2 Cal. 243.

A purported license issued pursuant to such a licensing act without the prepayment of the required fee is void.

As was stated in Woolen and Thornton on Intoxicating Liquors, Section 491:

> "Where a statute requires the fee for a license to be paid before it is issued, it must be paid for the entire period of the license and be paid in advance, or the license will be void. No officer can waive such a provision of the statute. Payment in part is not sufficient, even pro tanto; * * *"

and, as stated in Joyce on Intoxicating Liquors, Section 196:

> "As a general rule, it is a condition precedent to the issuance of a valid license that the fee therefor shall be paid in advance. A license issued on credit and without authority to so issue it is held not to be voidable merely, but void in the sense that it may be assailed even in a collateral proceeding."

See, also, *Town of Gallup v. Gallup etc. Co.* (N.M.), 191 Pac. 465, for a collection of authorities on this point.

The trustee was required either to procure a license or to incur the penalties provided in the Act. The cases cited in this portion of the brief are not in point and for that reason require no further analysis.

3. THE CONTENTION THAT THE DISTILLING EQUIPMENT HAD NOT FORFEITED TO THE STATE PRIOR TO BANKRUPTCY.

It is argued that the bankrupt possessed a license entitling him to own and possess the instant distilling equipment and that a failure to renew the license and pay the renewal fee did not result in a termination of the license privileges. It is further argued that under section 8 of the Alcoholic Beverage Control Act the license continued and the only penalty for failure to apply for a renewal and pay the renewal fee was the addition of a money penalty determined by the Board and not exceeding 25% of the amount of the fee due.

Concluding this argument, appellee declares (p. 17):

> "* * * the bankrupt was only delinquent in the payment of the yearly license fee, that the only penalty which could be enforced against said bankrupt, or his successor in interest, the trustee, would be the collection of a twenty-five per cent penalty for the failing to pay said tax."

This contention is not only erroneous, but is derived from a direct misstatement of the provisions of the Act. The provision of section 8 of the Act which counsel has quoted on page 16 of appellee's brief had been *repealed* for more than two years prior to the transactions involved in this case. At all times material to this proceeding, section 8 of the Alcoholic Beverage Control Act, relating to renewals, provided as follows:

> "* * * All other licenses (other than retailers' on-sale licenses) issued under this act shall be issued on the basis of a fiscal year commencing July first and ending July thirtieth.
>
> Every license issued under this act, effective on or after January 1, 1938, other than a temporary license, shall be renewable unless such license has been revoked, provided that renewal application is made and that the fee therefor is paid on or before the date on which payment thereof is due. If the fee for any license is not so paid, such license is automatically suspended, but may be reinstated by the board within thirty days thereafter upon payment of the amount due and in addition thereto, of such penalty as the board may by regulation prescribe, not to exceed twenty-five percent of the annual fee for such license. Unless such license is so reinstated, it is automatically revoked thirty days after the date upon which payment therefor is due, and no license shall be issued to the licensee thereunder except upon a new application."

It is thus apparent that by operation of law the bankrupt's license was terminated, revoked, and of no further effect, at least twelve days before the bankrupt filed his debtor's petition under section 322 of the Bankruptcy Act, on August 12, 1939. We do not wish to be understood, however, as conceding that appellee's interpretation of the earlier Act would have the effect he gives it.

The other argument made in this portion of the brief is that the forfeiture provided by the Act did

not occur and is dependent upon the judgment provided in the Act for the enforcement and confirmation of the forfeiture occurring upon the unlawful possession of the still.

The case of *People v. Broad,* 216 Cal. 1, is cited. In that case the state court held a forfeiture statute which did not provide for notice and an opportunity for hearing to the persons interested in the forfeited property before a judgment confirming the forfeiture could be declared was unconstitutional. The court states its holding as follows (p. 9):

> "'* * * we must hold the portion of the act which purports to authorize forfeitures without notice to the owner to be invalid.'"

The provisions of section 52 of the instant Act obviate the defect of the statute involved in the latter case.

This forfeiture statute is patterned after that contained in the State Narcotic Act. (Statutes 1935, page 2212, now codified in section 11,000 et seq. of the Health and Safety Code; Deering's General Laws, Act 5323.)

The provisions of said statute are constitutional. See:

People v. One 1933 Plymouth, 13 Cal. (2d) 565;

Van Oster v. Kansas, 272 U. S. 465, 47 S. Ct. 133, 47 A. L. R. 1044;

People v. One Harley Davidson, 5 Cal. (2d) 188.

Such forfeitures are effective upon the date of the unlawful act, and the judgment or confirmation merely determines the fact of forfeiture.

See:

United States v. Stowell, 133 U. S. 1, 10 S. Ct. 244 (cited in our Opening Brief, p. 17).

At this point we quote the following pertinent statement of the law contained in 23 American Jurisprudence at pages 606 and 607, on the subject of forfeitures and penalties:

> "* * * When * * * a forfeiture is declared by a statute, as is the procedure in this country under both Federal and state laws, the rules of the common law may be dispensed with, and the title to the thing forfeited may either vest immediately or on the performance of some particular act, according to the will of the legislature. This occurrence of the vesting of the title must depend upon the construction of the statute. The legislature has the power to decide on what event a divestiture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation.
>
> If a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the government, and the condemnation, when obtained, relates back to the time of the commission of the act and avoids all intermediate sales and alienations, even to purchasers in good faith. * * *

> In some of the cases, the question has been directly presented whether, after the forfeiture has taken place but in the absence of any judgment declaring the forfeiture, the former owner could maintain any action in reference to the forfeited property, and it has been held that he could not."

The footnote to the last sentence of the foregoing quotation from American Jurisprudence cites the following cases in support of this statement:

Oakland R. Co. v. Oakland etc. Co., 45 Cal. 365, 13 Am. Rep. 181;

McConathy v. Deck, 83 Pac. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896.

The forfeiture is effective upon the unlawful possession of the still by the bankrupt after his license privilege terminated, as provided in section 8 of the Act. The forfeiture provision is constitutional, and upon the unlawful possession, title to the still was transferred by operation of law to the State of California. Such a transfer is binding upon even *bona fide* purchasers.

United States v. Stowell, supra.

It follows that the still was forfeited before it came into the possession of the trustee.

4. THE CONFLICTING CLAIMS ARGUMENT.

This proceeding does not present conflicting claims between the State of California and the United States, as stated by appellee on pages 18 and 19 of his brief, and therefore his assertion that the law requires such conflicting claims to be determined in the bankruptcy court does not follow. The property, consisting of the still and equipment connected therewith, forfeited to the State prior to the time that the trustee in bankruptcy took possession, and the trustee only came into possession of *forfeited* property.

In this regard we again cite a case mentioned in our Opening Brief, viz.: *Traffic Truck Sales Co. v. Justice's Court,* 192 Cal. 377, at 383, which contains the following language:

> "When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed. (Cases cited.) The adjudicated cases establish the rule beyond all doubt that the forfeiture becomes absolute on the commission of the prohibited acts, and that the title from that moment vests in the state. (*Henderson's Disilled Spirits,* 81 U. S. (14 Wall.) 44, 57 (20 L. Ed. 815).)"

Appellee complains on pages 21 and 22 of his brief about the steps taken by appellants in the bankruptcy proceedings. The procedure taken, however, was the only orderly and legal method by which appellants could proceed to enforce the rights of the state against the forfeited property. There was no conflict of sov-

ereign interests, since the state law controls the regulation of liquor and stills.

United States Constitution, Twenty-first Amendment;
California Constitution, Article XX, section 22;
California Alcohol Beverage Control Act.

If the United States had a lien against the forfeited property, then under section 52 of the California Alcoholic Beverage Control Act provision is made for the assertion of such claim or lien. No such procedure was followed by the appellee, and it is improper for him to complain at this late date that his rights, or the rights of the United States for taxes due, if any, for which a lien existed, had not been protected.

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5. THE REFEREE IN BANKRUPTCY WAS WITHOUT JURISDICTION TO ENJOIN APPELLANTS.

At all events, it was improper for an injunction to issue against appellants to restrain them from enforcing the forfeiture for failure to pay the license fee.

The recent decision of *Corbett v. Printers & Publishers Corp., Ltd.* (U. S. Cir. Ct. of Appls., 9th Cir., decided April 13, 1942) 127 F. (2d) 195, held that a Federal court was without jurisdiction to enjoin a tax collection. It was pointed out in this case that Judicial Code, section 24(1) (28 U. S. C. A. sec. 41, subd. (1)), provides that no district court shall have jurisdiction of any suit to enjoin collection of any tax im-

posed by a statute if a sufficient remedy may be had in the courts of such state.

The remedy available to appellee in the case at hand was payment of the licensee fee under protest. Merely because appellee did not avail himself of this remedy does not change the rule announced in *Corbett v. Printers & Publishers Corp., Ltd., supra,* and the injunction was therefore improperly granted.

CONCLUSION.

With respect to the discussion of authorities contained in appellee's brief on pages 22-24 in his analysis of the argument made in our brief, we feel that nothing said requires answer, as we have fully stated appellants' position in our Opening Brief and in this Reply Brief.

Briefly stated, it is the position of appellants that the still property was forfeited at the conclusion of the license period, namely: June 30, 1939, and that thereafter the bankrupt and his successor in interest, the trustee (appellee herein), were possessed of forfeited property; and that the adjudication of bankruptcy and the appointment of appellee as trustee did not alter the legal title to the property, which had become vested in the State by operation of law. In any event, the trustee having failed to pay the license fee, the property then became forfeited. Therefore, the injunction was improperly granted and the State

should have been allowed to institute proceedings to confirm the forfeiture in the usual manner provided for by the State statutes.

It is again respectfully submitted that the judgment of the court should be reversed with directions to the court below to grant leave to appellants to proceed as they may be advised in the enforcement of the penal and forfeiture provisions of the Alcoholic Beverage Control Act of the State of California.

Dated, San Francisco, California,
June 8, 1942.

Respectfully submitted,

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